NO. 97-1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VAUGHN MURPHY,
Petitioner,
v.
UNITED PARCEL SERVICE, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITIONER

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STATEMENT OF AMICUS INTEREST

The Commonwealth of Massachusetts, the State of West Virginia and the undersigned __ amici states have a direct interest in the resolution of this case. First, the states seek to assure that their citizens obtain full protection and coverage under the Americans with Disabilities Act ("ADA"). Second, many of the amici states follow federal law in deciding employment-related disability issues under their state law and would likely be impacted by the decision in this case. Finally, the States have a strong public policy interest in this case because of their interest in: (1) promoting self-help of disabled persons without putting at risk their protection under the ADA, including their right to a reasonable accommodation; (2) assuring consistent coverage under the ADA, as a threshold matter, for persons with similar disabilities under state and federal law; and (3) providing a forum

for challenging automatic job disqualifications based on underlying medical conditions.

STATEMENT OF FACTS

The Commonwealth of Massachusetts, the State of West Virginia and the undersigned adopt the statement of facts set forth in the Petitioners' Briefs in *Murphy v. United Parcel Service, Inc.* No. 97-1992.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision, if affirmed, would have the deleterious effect of disadvantaging people with underlying impairments who engage in self-help, by denying them protection under the ADA, if their mitigating measures are successful. Such employees who have mitigated their impairments and would not be considered disabled under the ADA, therefore, would lose their right (1) to a legal forum to challenge job exclusions which are, in fact, based on the underlying impairment and (2) to request a reasonable accommodation under the Act.

ARGUMENT

I. INTRODUCTION

The Amici states are submitting this brief on the first issue before the Court which concerns the standard by which a

determination of "disability" is made under the first prong of its statutory definition. *See* 42 U.S.C. §12102(2)(A) (a disability is " a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"). Specifically, the question is whether the "impairment" should be evaluated without considering the ameliorative effects of medication, prosthetic devices or other forms of assistance as required under an Equal Employment Opportunity Commission ("EEOC") Interpretive Guidance. *See* 29 C.F.R. Part 1630, App. §§1630.2(h) and 1630.2(j) (whether an individual has an "impairment" and whether that impairment "substantially limits a major life activity" should be made "on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices"). Or alternatively, as the Tenth Circuit has held in this case, that ameliorative measures should be considered when making the threshold determination of whether a person suffers from a disability.[1]

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[1] The amici states believe that the First Circuit conducted a particularly thorough and persuasive analysis of this issue in *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 857 (1st Cir. 1998), when it held that the EEOC Interpretive Guidance setting forth the "no mitigation measures" rule was a reasonable interpretation of the ADA. The court determined, first, that "the plain language of the ADA is not so clear and unambiguous" on the subject. Therefore, it looked to the legislative history of the Act, from which it concluded that it was "abundantly clear that Congress intended the analysis . . . to be made on the basis of the underlying (physical or mental) condition, without considering the ameliorative effects of medication, prostheses, or other mitigating measures." *Id.* 136 F.3d at 859. The court

It is the view of the Amici that the EEOC's "no mitigating measures" Interpretive Guidance embodies the correct position. The use of mitigating measures does not eliminate the underlying disability, although it may reduce or control its effects in the short or long term. It is illogical and contrary to the public policy the states seek to promote to disadvantage employees who engage in successful self-help, by denying them the protection of the ADA, while at the same time providing ADA protection for similarly situated employees who do not ameliorate their underlying medical conditions.

For this reason, and others articulated below, this Brief of Amici is submitted.[2]

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also took into consideration what it concluded were the broad remedial goals of Congress in enacting the Act. *Id.*, 136 F.3d at 861.

The majority of circuit courts that have considered this issue have reached the same result. *See Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321 (2nd Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997); *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995). *But see Sutton v. United AirLines*, 130 F.3d 893 (10th Cir. 1997); *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part).

[2] Many states interpret provisions of their state disability statutes by looking to federal court interpretations under the ADA. *See, e.g., Arnold* 136 F.3d at n.2 (the First Circuit, when

II. APPLYING THE EEOC'S "NO MITIGATING MEASURES" INTERPRETIVE GUIDANCE FOR DETERMINING WHETHER AN EMPLOYEE SUFFERS FROM A DISABILITY RESULTS IN CONSISTENT APPLICATION OF THE ADA, AS A THRESHOLD MATTER, TO EMPLOYEES WITH SIMILAR UNDERLYING MEDICAL CONDITIONS AND ALSO PROMOTES SOUND PUBLIC POLICY.

Under the Tenth Circuit's decision, which requires that the threshold question of disability be determined only after ameliorative measures are taken into consideration, people with disabilities are penalized for their diligent efforts to reduce the impact of their impairments on major life activities because they lose the protection of the ADA. The fundamental unfairness and deleterious impact of such a rule is demonstrated in *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997).

In that case, the plaintiff suffered from non-insulin dependent

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interpreting the Maine Human Rights Act, concluded that because "the ADA has 'provided guidance to Maine courts in interpreting the state statute,'" [citations omitted], determination of ADA claim also resolves state claim); *Latch v. Southeastern Pennsylvania Trans. Auth..*, 984 F. Supp. 317 (E.D.Pa. 1997) (Pennsylvania courts look to the ADA in interpreting state's anti-discrimination statutes). *See also Woods v. Friction Material, Inc.*, 30 F.3d 255, 263 (1st Cir. 1994) (Massachusetts' highest court "may look to the interpretations of analogous federal statutes," [citation omitted], in interpreting state anti-discrimination statutes).

diabetes which, once it was diagnosed, he was able to control through a strict regimen of oral medication, rigorous monitoring of blood sugar levels, diet, exercise and proper rest. *Id.* at 761. In the absence of these mitigating measures, the plaintiff employee testified that his blood sugar level "fluctuated widely," resulting in a personality change that substantially limited his ability to work. *Id.*

The court in *Gilday*, with one judge dissenting, rejected the EEOC Interpretive Guidance. It concluded that while the plaintiff was "impaired" under the ADA, the question of whether the impairment amounted to a disability within the meaning of the ADA must be determined by taking into consideration any mitigating measures the plaintiff undertook to control his impairment. Since the plaintiff, through the strict regimen discussed above, could control his condition, he was not found to be "substantially limited" in the major life activity of working and, therefore, was not disabled under the ADA.

As a result of this ruling, an individual with the same general "impairment" as the plaintiff in *Gilday* -- non-insulin dependent diabetes which results in a personality change that affects the major life activity of working -- who does not adopt self-help measures, would likely be covered by the ADA even though he has been "unable to muster the self-discipline to follow his regimen." *Gilday*, 124 F.3d at 764 n.5 (Moore, J., dissenting). Whereas, the plaintiff in *Gilday*, who independently took the initiative and successfully brought his diabetes under control, would be denied such coverage. Such an approach not only discourages self-help, but also results in inconsistent application of the ADA -- as a threshold coverage matter -- to employees with similar underlying medical conditions.

Thus, in the case before this Court, the Tenth Circuit ruling would render contrary findings of ADA coverage for a plaintiff like Murphy who takes his hypertension medication and has controlled his underlying impairment and a plaintiff who suffers from the same underlying medical condition as Murphy but does not take his medications (either because he refuses or cannot afford them) or does not take them regularly as medically required. While the latter would be protected under the ADA, the former would not.

The First Circuit noted the illogic of this result in another diabetes case, *Arnold*, 136 F.3d at 863 n.7. In that case, the plaintiff suffered from type I insulin-dependent diabetes mellitus which required that he monitor his blood glucose levels throughout the day and give himself injections of insulin two to four times a day, keep constant attention to possible signs of hypoglycemia, and follow a strict diet and exercise regimen to control the disease. By these mitigating measures, the plaintiff was able to control the disease. *Id.* The First Circuit commented as follows:

> That a person with a disability is able to use medical knowledge or technology to overcome many of the effects of his illness (in Arnold's case, by a continuing regimen of medicine, proper eating habits, and rest) may mean that he will, in practice, rarely require any sort of accommodation from his employer; but his achievement should not leave him subject to discrimination based on his underlying disability. He should not be denied the protections of the ADA because he has independently taken the initiative and successfully brought his diabetes

> under control. It is hard to imagine that Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but to deny protection to workers who act independently to overcome their disabilities, thereby creating a disincentive to self-help.

Id. See also Bragdon v. Abbott, 524 U.S. __, 118 S. Ct. 2196, 2206 (1998) ("[T]he disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable"); *Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997) ("Individuals who need wheelchairs, artificial limbs, hearing aids and other prosthetic devices clearly have impairments that may substantially limit their major life activities. Neither as a matter of law nor of common sense would we say that they are not impaired or disabled because their prosthetic device happens to be exceptionally good.").

Also, under the Tenth Circuit's decision, an employee without insurance, who cannot afford treatment for an underlying medical condition, would be protected in the hiring process under the ADA. Once he was hired, however, and was insured under a company's health plan and able to obtain treatment, he would no longer be considered "disabled" and would lose the protections of the ADA. Therefore, he could be fired on the basis of his disability without the ability to resort to the protections of the ADA. This interpretation of the ADA "would be inconsistent with the Act's broad remedial purposes." *Arnold*, 136 F.3d at 862. *See also Penny v. United Parcel Serv.*, 128 F.3d 408, 414 (6th Cir. 1997).

The concern that applying the EEOC Interpretive Guidance (which requires that the threshold question of "disability" be determined without regard to mitigating measures) would result in coverage under the ADA of a larger number of Americans, is unpersuasive in light of clear Congressional intent. As the First Circuit noted, that is what Congress intended:

> The very first finding Congress listed in the preamble to the Act is that "some 43,000,000 million Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." 42 U.S.C. §12101(a)(1). It thus appears that Congress not only considered but actually intended that the ADA's protections sweep broadly, covering a significant portion of the American populace.

Arnold, 136 F.3d. at 862.

III. THE TENTH CIRCUIT'S DECISION CREATES A CONUNDRUM FOR EMPLOYEES WHO ARE BARRED FROM JOBS BECAUSE OF THEIR UNDERLYING IMPAIRMENT, EVALUATED WITHOUT REFERENCE TO MITIGATING MEASURES, AND YET ARE UNABLE TO CHALLENGE THE LEGAL BASIS OF THE DISQUALIFICATION BECAUSE THEY ARE NOT DEEMED DISABLED UNDER THE ADA.

The decision of the Tenth Circuit in *Murphy* highlights the dilemma faced by employees whose disabilities are evaluated in

a mitigated state. The petitioner job applicant in *Murphy* was automatically disqualified from the position of mechanic at United Parcel Service, Inc. ("UPS") because he suffered from severe hypertension and failed to meet a Department of Transportation ("DOT") blood pressure standard. Therefore, he could not be qualified to operate a commercial motor vehicle. He was disqualified despite the fact that he had worked as a mechanic for Ryder Truck Rental for the past 22 years and was able to perform the job adequately.

Thus, the job applicant was barred by a DOT standard from the mechanic's job because of his underlying impairment of severe hypertension, which is evaluated in its unmitigated state. However, the Tenth Circuit concluded that Murphy was not "disabled" under the ADA -- a determination it made after considering the mitigating measures Murphy undertook, which effectively controlled the underlying impairment. As a disabled person, Murphy would have been able to litigate the legality of the DOT standard under the ADA (and whether it was properly interpreted and applied by his employer).[3] Since he is not considered disabled, however, his employer's decision is insulated from review.

This is precisely the predicament the First Circuit in *Arnold*, 136 F.3d at 862, sought to avoid by applying the EEOC's

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[3] Apparently, there is some question as to whether the DOT regulation mandated disqualification of applicants with blood pressure in excess of 160/90 (since this standard is based in a DOT publication) or whether UPS's reliance on this regulation was misplaced and the company was in fact imposing its own requirement on applicants.

Interpretive Guidance to the threshold question of disability. The First Circuit stated:

> Arnold's diabetes makes him just the type of person the ADA was designed to protect. He would have been hired by UPS but for his inability to get a commercial vehicle license, which was prevented only because he had diabetes (the underlying medical condition, without taking into account ameliorative treatments). But Arnold alleges that, with treatment, he can perform the job despite his impairment if UPS will reasonably accommodate him. This would ordinarily be a factual question on the merits for the court to determine. Yet, under UPS' and the district court's interpretation of the ADA, a person in this archetypical situation is not protected from discrimination by the ADA because he is not disabled and hence not even a proper plaintiff under the Act. According to UPS, in such circumstances, the trier of fact never gets to the merits of the alleged discrimination, or the "qualified individual" requirement, or of reasonable accommodation.

Id. at 862.

Under the Tenth Circuit's decision, employees who are barred from jobs for failure to meet impairment-based company policies, guidances or regulations have no legal recourse for challenging the basis of those policies, guidances or regulations. Permitting employees the opportunity to challenge the assumptions upon which their disqualifications are based is consistent with Congress's broad remedial goals in enacting the

ADA. *Arnold*, 136 F.3d at 861.[4]

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[4] The two plaintiff job applicants in the *Sutton* case, No. 97-1943, which is also before this Court, were automatically disqualified from positions as pilots for a major global air carrier because of a company policy that required applicants to have uncorrected vision of 20/100 or better--despite the fact that the Federal Aviation Agency had awarded both applicants first class medical certificates under which they had long been employees as commercial pilots for commuter airlines. As in *Murphy*, their underlying impairment was evaluated without reference to mitigating measures and their legal blindness automatically disqualified them under a company policy from the pilot position.

While vision cases may present a different standard of analysis since vision is easily correctable with eyeglasses or contacts lenses, *see Arnold*, 136 F.3d at 866 n.10, including such plaintiffs within the scope of the ADA, by evaluating the vision impairment in an unmitigated state, will at least permit an employee the opportunity to test the legitimacy of the company policy under the ADA. If the Suttons were deemed disabled in their unmitigated state, their employer could still assert that: (1) they are unable to perform an essential function of the job with or without a reasonable accommodation; (2) any accommodation requested would create an undue hardship; or (3) public safety justified the blanket disqualification. 42 U.S.C.§§12111 and 12113. *See also Arnold*, 136 F.3d at 861.

IV. PROTECTION UNDER THE ADA IS ESSENTIAL FOR EMPLOYEES WITH UNDERLYING IMPAIRMENTS, EVEN WHEN THE IMPAIRMENT IS PARTLY OR FULLY CONTROLLED BY MITIGATING MEASURES, SO THAT SUCH EMPLOYEES ARE ENTITLED TO A REASONABLE ACCOMMODATION SHOULD THE NEED ARISE.

Another anomalous result that flows from the Tenth Circuit decision is that people who would otherwise be covered by the ADA for an underlying impairment, but for their ameliorative efforts, are not entitled to even the most minor accommodation. The dissent in *Gilday*, 124 F.3d at 764 (Moore, J. dissenting), provided an example which highlights this problem. It noted that a person with a heart condition who ameliorates the condition by obtaining a pacemaker will be refused protection under the ADA because the mitigation measure successfully controlled the underlying condition. That person, therefore, will not be entitled to any reasonable accommodation -- even one as simple as moving a desk away from a microwave oven to avoid disrupting the medical device.

There are countless examples of the kinds of accommodations that people with a "controlled" impairment might need. First, "ameliorating" the impairment itself may require absences from work -- for example, to attend doctor's appointments, physical therapy, or to obtain testing. Additionally, the mitigating measures may take up work time where, for

example, an employee must take medications on a prescribed schedule or undergo self-testing of the underlying condition.

Also, a controlled condition may not remain permanently controlled. The *Harris* case demonstrates the dilemma an employee can face in this circumstance. In that case, the plaintiff employee suffered from Graves' disease, an endocrine disorder which affected the thyroid gland. She had been diagnosed with the disease twenty years previously and prescribed medication which controlled the condition -- with one exception. In her third year of employment as a comptroller with the defendant company, Harris experienced a "panic attack" due to an overdose in her medication. The overdose occurred because of a change in the manufacturer of the drug. She was hospitalized for eight days in a psychiatric ward and out on sick leave for approximately two months. *Harris*, 102 F.3d at 518.

While Harris was on sick leave, her employer hired another individual to become comptroller. When she returned to work, Harris was informed that she would need to seek other employment. *Id.* According to papers submitted on summary judgment, the plaintiff's employer stated that he *"felt that the company was put in jeopardy*, at a disadvantage *due to her type [of] illness*." *Id.*, 102 F.3d at 523 (italics in original).

The employee filed an ADA claim against her employer which was dismissed by the district court on summary judgment. The district court held that the employee's impairment did not rise to the level of a disability. *Id.*, 102 F.3d at 519. It reached this decision by taking mitigating measures into consideration and concluded that, except for this one instance, the employee's impairment was controlled. Thus, under this approach (which is the same as the Tenth Circuit's), Harris would be barred from

challenging her employer's actions under the ADA, even though they were clearly based on her medical condition. Moreover, the plaintiff would not be allowed to assert that her two month sick leave was a reasonable accommodation of her disability.

The Eleventh Circuit reversed the decision of the district court after applying the EEOC Interpretive Guidance and concluded that Graves' disease (which in its unmedicated state would lead to coma and death) was a disability within the meaning of the ADA, and the employee's legal action could go forward. *Id.*, 102 F.3d at 521.

Thus, symptoms may arise from the ameliorating medications, or when the existing medications cease to be as effective as in the past, and can readily result in inconsistent control of the impairment. "[T]he manifested symptoms of an 'underlying disability may be episodic or temporary in nature while the impairment itself is both chronic and permanent.'" *Harris v. H&W Contracting, Company*, 102 F.3d at 520. For this reason, an employee who has an underlying impairment which in its unmitigated state "substantially limit[s] one or more of the major life activities" of that individual; 42 U.S.C. §12102(2)(A); should be covered as a disabled person under the ADA.[5]

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[5] An employee is entitled to a reasonable accommodation only if deemed to be disabled under the first prong of the ADA definition. *See Gilday*, 124 F.3d at 764 n. 4. (Moore, J. dissenting). Thus, providing ADA coverage under the third prong ("regarded as" disabled) for employees who control their underlying impairments through mitigating measures would be inadequate. An employee who is deemed "regarded as" disabled is not entitled to an accommodation. *Id.*

CONCLUSION

For the foregoing reasons, the amici states respectfully request that the Court reverse the Tenth Circuit decision in this case.

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Date: February 22, 1999